Chapter 1. Overview of Bodies Involved in Dispute Resolution

In most legal systems, there are a number of bodies and institutions that may play a role in dispute resolution. Courts usually play the anchoring role, but other bodies, including the prosecutor, state administrators, and facilities for arbitration and/or mediation may also be involved. Of course, every institution does not get involved in every dispute. In understanding your options, and anticipating possible developments, it is important to know what bodies and officials exist and what their roles are in the legal system and in the dispute resolution process. This chapter provides an overview of the different institutions and their functions. Chapter 2 will examine more closely the jurisdictions and limits of authority of the main bodies in the system - the courts and arbitration tribunals.

or those resolving international commercial disputes. Because of this dual use of the term "arbitrazh," and the high probability that it will be translated into English as "arbitration" in all contexts, is important to clarify the institution that is actually meant, whether in negotiations and the formulation of contracts, in discussions with legal counsel or in legal literature.

2. State Arbitrazh and the Creation of the Arbitrazh Courts

Arbitrazh courts in their current form have existed in the Russian Federation for less than ten years. Prior to 1991, there existed a system known as "state arbitrazh." State arbitrazh had jurisdiction over the majority of disputes between and among enterprises and other legal entities, as well as disputes between those entities and state bodies. Disputes involving individuals and, in general, disputes not related to planned activities or state supervision of enterprises were handled by the courts. The state arbitrazh system, which grew out of a system of arbitrazh commissions created in the early 1920s, remained in place until 1991, undergoing gradual development from a somewhat dispersed system of dispute resolution bodies with limited formality in procedures toward a more unified system, with increasingly specific and formal rules of procedure and principles for its activities. However, although increasingly formal and "legalistic" in its rules and procedures, the state arbitrazh system remained an administrative body or a quasi-court rather than a court.

The primary function of state arbitrazh was to resolve disputes and difficulties in which a mandatory planning element or a relationship of subordination (as of an enterprise to a state body supervising its activities) was involved. It is important to note, however, that its jurisdiction was not defined in these terms, but rather by the characteristics or legal status of the parties. State arbitrazh had jurisdiction over disputes involving enterprises, institutions and other legal entities and over the disputes of legal entities with state bodies. Disputes involving individuals as even one of the parties were handled by the courts. However, because the spheres of activity of these groups were not permitted to overlap significantly, the division of cases by the characteristics of the parties had the effect of also dividing cases according to type of dispute and applicable law. Individuals were permitted to engage in economic activity for profit only in extremely limited circumstances and their disputes were generally governed by the Civil Code and legislation on consumer protection, labor and social protection. Nearly all activity of enterprises, on the other hand, was governed by legislation on planning and on mandatory forms for enterprise activity, as well as by specific planning orders and regulations. State arbitrazh bodies resolved all commercial and industrial matters on the basis of legal rules applicable to planning and state administration of the economy, while the courts handled cases related to individual matters, which were governed by a different set of legal rules.[1] Consistent with this division of subject matter, foreign trade cases and

[1] Exceptions were made in a few cases in which the division by party status didn't correspond to the broad division of subject matter and applicable law between the two bodies. For example, certain cases concerning very small amounts or unplanned transactions, which were governed by the rules of the Civil Code rather than planning legislation, were assigned to the courts for resolution, even though the parties involved (enterprises) met the status criteria for state arbitrazh.

others in which a foreign firm or entity was involved were within the jurisdiction of the courts despite the identify of the parties as legal entities, since foreign firms were not governed by planning legislation or subordinated to Soviet state bodies.

During the 1980s, a number of pieces of legislation were passed authorizing new, private types of economic activity by individuals, cooperatives and other entities and increasing possibilities for foreign trade and investment. Some of these laws gave jurisdiction over disputes concerning that activity to the courts. This was taken by some to indicate that the traditional division of competence between state arbitrazh (handling planning matters, administrative issues, and mandatory rules) and the courts (handling disputes between equal parties) would be maintained, and that the jurisdiction of state arbitrazh would simply shrink as market-oriented economic reforms moved the Soviet economy toward increasing amounts of unplanned economic activity. In the spring of 1991, however, a law was passed in the RSFSR[2] creating a system of "arbitrazh courts" — a new branch of the court system with a relatively broad jurisdiction.

The new courts were given jurisdiction over domestic disputes concerning "entrepreneurial activity," including those involving legal entities and also individual entrepreneurs.[3] Amendments to the law in 1992 refined the definition to give the arbitrazh courts jurisdiction over disputes "arising from civil-law relationships (economic disputes) or from relations in the sphere of administration," provided that the disputes involved enterprises and organizations that are legal persons or registered individual entrepreneurs. While the element of legal status of the parties, key to defining the jurisdiction of state arbitrazh, was maintained in these definitions, no additional element was added to the jurisdictional definition concerning a planned or mandatory element or relationship of administrative subordination. Thus, the new courts were effectively given jurisdiction over a broad field of disputes arising in the course of commercial activity. This was seen by some as an attempt to create "commercial courts" similar to those existing in some other jurisdictions, and the arbitrazh courts are referred to by some authors and translators as the "commercial courts." The use of party status to define the jurisdiction of the arbitrazh courts, however, and the retention of jurisdiction over disputes involving state bodies, produced a jurisdiction quite a bit broader than that of the commercial courts in many countries. Unlike many commercial courts, the arbitrazh courts do not apply a commercial code or a body of law separate from that which governs similar disputes heard by the courts of general jurisdiction.[4] The jurisdiction of the

[2] The Russian Soviet Federated Socialist Republic - the name of what is now the Russian Federation when a constituent part of the Soviet Union.

[3] Legislation passed in the mid-1980s allowed individuals to engage in economic activity for profit, provided they register as "individual entrepreneurs" with the state. Registration facilitates tax collection and other state supervision of entrepreneurial activity, and penalties are imposed on those who engage in individual entrepreneurial activity without registering as required by law. At present, individuals may also choose to form a legal entity and to pursue business activity through the entity, rather than directly as individuals.

[4] There are some special rules in the Civil Code of the Russian Federation which apply to firms and entrepreneurs and do not apply to citizens involved in the same types of transactions in their private capacity. The number of these is limited, however, and in general the arbitrazh courts and the courts of general jurisdiction are called upon to apply many of the same legislative provisions in resolving disputes.

Russian arbitrazh courts includes not only disputes concerning commercial dealings, but also other types of disputes between the parties and many types of administrative disputes involving the state.

The creation of the new system of arbitrazh courts, based in part on the existing state arbitrazh, made arbitrazh bodies and arbiters subject to the effects of a number of other laws which were designed to protect the independence of courts and to raise the status of judges. It also created some new questions in relation to the earlier pieces of legislation that had assigned dispute resolution concerning new types of economic activities to the "courts" or "through a court procedure." Prior to the creation of the arbitrazh courts in 1991, these were unambiguous references to the courts of general jurisdiction — the only court system then existing. With the creation of a new set of "courts" with jurisdiction over such disputes, the references were no longer so clear. The definition of the jurisdiction of the arbitrazh courts as disputes concerning "civil law relationships" raised questions about disputes and transactions not related to commercial conduct, while the restriction of jurisdiction to registered individual entrepreneurs left questions about investment disputes involving individuals who are not entrepreneurs and other issues related to commerce.

3. Current Structure and Jurisdiction of the Arbitrazh Courts[5]

a) Current Jurisdiction of the Arbitrazh Courts

In 1995, a federal constitutional law "On Arbitrazh Courts in the Russian Federation" was passed, together with a new procedural code for the arbitrazh courts. The new law eliminated the reference to civil-law relationships and illustrated the types of "economic disputes" subject to the jurisdiction of the arbitrazh courts by providing a list of the types of disputes involved. Like the previous law, the new law maintains the status requirements for arbitrazh court jurisdiction — requiring generally that parties be either legal entities or registered individual entrepreneurs. It eliminated, however, the artificial assignment of disputes with any "foreign element" to the courts of general jurisdiction. These disputes are now subject to the jurisdiction of the arbitrazh courts if they meet the general jurisdictional criteria concerning subject matter and status of the parties.

b) Current Structure of the Arbitrazh Courts

Under the 1991 law that created them, the arbitrazh courts were structured as a two tier system, consisting of many arbitrazh courts, each covering a defined territory, and a single superior court — the Higher Arbitrazh Court — for the entire country. ***The Handbook uses the term "Higher Arbitration Court" — a literal translation of the name of the court — to denote the highest court in the arbitration court system. The term "Supreme Arbitration Court" is also commonly used in English, and readers should be aware that the reference is to the same court.*** The various arbitrazh courts

[5] Readers may find some basic information on the arbitrazh court system in English, and a more extensive amount of information, including notes on case decisions, in Russian on the web site for the Russian arbitrazh court system, at www.arbitr.ru.

heard cases in the first instance (the first hearing and decision of the case) and also appeals of first instance decisions. Cassational review — that is, review for legal error only — and also a discretionary "supervisory" review were handled by the Higher Arbitrazh Court. The Higher Arbitrazh Court also had a substantial first instance jurisdiction over serious cases and administrative responsibility for the entire system, as well as the obligation to study the trends in lower court decisions and issue "guiding explanations" to ensure the correct and uniform application of the laws. This structure placed substantial burdens on the Higher Arbitrazh Court's resources.

The 1995 law, under which the arbitrazh court system currently operates, moved much of the Higher Arbitrazh Court's first instance jurisdiction into the lower courts and created an additional tier of arbitrazh courts. The new tier of courts consists of ten "circuit" arbitrazh courts, each of which is assigned a broad territory. The courts serve as a review instance between the lowest arbitrazh courts and the Higher Arbitrazh Court. They are responsible for the cassational review of cases — the review of a case to determine whether significant errors were made in the interpretation or application of the laws by the lower arbitrazh courts.

Under the current structure, the lowest arbitrazh courts hear most cases in the first instance and also consider appeals of first instance decisions. Appeals are directed to the same court that issued the first decision, but must be considered by different judges than those who heard the case originally. When considering an appeal, the lower courts may approach the case *de novo*. In other words, they may recall witnesses and reevaluate the evidence presented in the first hearing of the case, may take new evidence and may reconsider any aspect of the case. The circuit arbitrazh courts hear cassational appeals of the decisions of the lower arbitrazh courts. Because cassational appeals concern only the proper interpretation and application of the law, the circuit courts do not take new evidence.

This restructuring of the system under the 1995 law was intended to free the Higher Arbitrazh Court from a heavy burden of cassational appeals and allow it to accomplish its tasks in the areas of administration of the arbitrazh court system and in review of court practices. On the basis of such reviews, the Higher Arbitrazh Court issues decrees, letters and summaries of practice containing information and guidance for the courts on the proper interpretation and application of the laws. The interpretations and rules of application contained in these documents are binding upon the lower arbitrazh courts.

The Higher Arbitrazh Court also retains its function of hearing cases in "supervisory proceedings." "Supervisory" review of a case is a discretionary review, usually reserved for instances in which a significant error of law has occurred. These cases are heard on the basis of a "protest" concerning an error in the application or interpretation of procedural or substantive law. Protests can be submitted to the Higher Arbitrazh Court only by a very limited number of persons, including the Chair and Deputy Chairs of the Higher Arbitrazh Court and the Procurator General and his deputies. A party may request that a protest be submitted, but the submission of a protest is at the discretion of those who have the authority to do so.

CURRENT STRUCTURE OF THE ARBITRAZH COURT SYSTEM

Higher Arbitrazh Court

Reviews cases on the basis of protests, issues decrees and summaries of practice providing mandatory rules of interpretation and application as guidance for the lower courts, has administrative responsibilities for the system as a whole

Ten Circuit Arbitrazh Courts

Review cases for errors of law, may not accept new evidence or alter evidentiary findings of the lower courts

Arbitrazh Courts

Hear most cases in the first instance, appeals of first instance decisions heard *de novo* by a different bench

B. The Courts of General Jurisdiction

1. What are the Courts of General Jurisdiction?

The courts of general jurisdiction are just what their name implies. They are the general courts and have jurisdiction over all cases of any kind which may be heard by a court in the Russian Federation and which are not specifically assigned to the jurisdiction of another court. The "general jurisdiction" of the courts does not, however, imply a broad overlap with the jurisdiction of the other courts in the system — the arbitrazh courts and the Constitutional Court. As a rule, a particular dispute or legal matter will be considered to fall within the jurisdiction of only one of the courts in the system. For example, a law may state that cases or disputes that arise concerning it are to be resolved by a court or arbitrazh court. This might, at first glance, appear to suggest alternative jurisdiction in the two types of courts or the right of a plaintiff to choose where to file. Such a provision, however, is commonly interpreted to mean that those cases under the law which meet the required jurisdictional conditions of the arbitrazh courts will be subject to arbitrazh court jurisdiction, while all other cases will be submitted to the courts of general jurisdiction.

2. Courts and the Continuing Process of Court Reform

The organization, structure and jurisdiction of the courts, as well as the locus of control over their activities, shifted a number of times during the life of the Soviet Union.[6] In general, the courts had a broad jurisdiction, hearing civil and criminal cases as well as administrative and other matters assigned to the courts. Disputes between enterprises or concerning economic planning issues, however, were never heard by the Soviet courts and were assigned instead to state arbitrazh, as discussed above. Within a given court, the case load might be divided among groups of judges specializing in particular types of cases, or by a geographic division of the territory within the court's jurisdiction. Most cases were heard in the first instance in the local peoples courts, but the superior courts all had some form of first instance jurisdiction over more serious cases, including the USSR Supreme Court. All of the superior courts had presidiums, consisting of the chair and deputy chairs, along with some other members, which exercised supervisory functions and considered "protests" or appeals brought against the judgments of the court. The presidium, and in some cases the plenum, of higher courts also spent a considerable amount of energy in the study of court practice. On the basis of the study of practice, the highest courts could issue "guiding explanations," which discussed common mistakes or misinterpretations and gave general instructions concerning the proper interpretation and application of the laws.

The court system included "union level" courts (at the level of the Soviet Union as a whole) and also courts at the level of the union republics (Azerbaidzhan, Georgia, Ukraine, etc) and several levels of lower courts serving defined regions. Despite some elements of federalism in the structure of the state and in some legislative patterns, however, the court systems were not divided along horizontal lines nor between the union or "federal" courts and the lower courts. All of the courts were considered parts of a single, unitary system of courts. This conception of the court system as unitary has been retained by the Russian Federation to the present time.

It should be noted that theories of separation of powers were not accepted in Soviet political and legal theory until the late 1980s, and there was, accordingly, no attempt by Soviet authorities to create in the courts a "third branch" of government, with the corresponding authority and independence. The courts were acknowledged to be subordinate to the higher bodies of the state — specifically to the Supreme Soviet and to the Council of Ministers through the Ministry of Justice — and no court had the power to void or invalidate a legislative or regulatory act.[7] Judges were appointed for short terms by government bodies at the same territorial level as the relevant court, were subject to

[6] The reform of courts and legal procedures had been a subject of significant attention and debate during the later part of the pre-Revolutionary period as well. A recounting of the development of the Russian and Soviet courts and the numerous shifts in their structure and the theories of their operation is beyond the scope of this Handbook. The general description appearing in the text applies to the system put in place in the late 1950s, which retained its basic elements and developed in a relatively consistent pattern through the late 1980s.

[7] Courts did have the power to refuse to apply, in a concrete case, a regulatory act that violated or contradicted a legal act of a higher force.

recall by those bodies and dependent upon their re-nomination for continuation of their judicial careers, and also relied upon those bodies for some parts of both their professional and personal material support. The Ministry of Justice controlled judicial budgets and bonuses, and was responsible for dealing with complaints and evaluating judicial performance.

As a part of the reform efforts begun in the mid to late 1980s, the need for the creation of a "law-based state" was declared and significant attention was focused on the reform of legal institutions, including courts. In 1989, a new set of fundamental principles of legislation on the court system was passed, along with laws defining the status of judges and imposing penalties for disrespect to the court. Among other changes, these laws attempted to reduce interference in judicial decision making by having judges elected by state bodies at a higher level of state administration than that at which the court functioned and imposing fines, or even prison terms, for attempts to improperly influence specific decisions or refusals to carry out legitimate orders of the court.

Changes in this area created by the laws of the Soviet Union continued in force after its dissolution in the Russian Federation, and the process of court reform continued at the level of the Russian Federation. The RSFSR had passed a law in mid-1991 creating a Constitutional Court with broad powers of judicial review and 1992 saw the passage of another law on the status of judges, granting life tenure to most newly appointed judges and creating exclusively judicial bodies for discipline and for participation in judicial nominations. The passage of the 1993 Constitution heralded further changes, including confirmation of the direct effect of constitutional norms and the extension of additional procedural powers to judges. In addition, the text of the new Constitution required the passage of several "federal constitutional laws"[8] defining the organization of the court system as a whole and the competence and structure of the three highest courts and of all federal courts, offering an opportunity for implementation of various reform and restructuring proposals.

The required new law on the Constitutional Court was passed in 1994, but other legislation was slower, with the new law on the arbitrazh courts passing in 1995, and the new law on the court system in general in 1996. A number of steps remain to be taken, especially in relation to the courts of general jurisdiction. Dialogue continues concerning the proper distribution of judicial power between the federation and the regional and local governments and the means to ensure adequate financing and provision for the courts at all levels while preventing undue influence on them from the sources of support. In part due to continuing questions about these issues, the required federal constitutional law on the courts of general jurisdiction has not yet been passed at the time of this writing, leaving open significant questions about the structure of that court system and the possibility of additional, substantial change in the near future.

[8] A federal constitutional law is a law required by the text of the constitution. Passage of federal constitutional laws requires a super-majority in the two chambers of the parliament and a federal constitutional law stands a step higher in the hierarchy of legal acts than other federal laws passed through the standard legislative procedures.

3. Current Structure and Jurisdiction of the Courts

The courts of general jurisdiction have jurisdiction over all cases which may be heard by a court in the Russian Federation and which are not assigned to the jurisdiction of the arbitrazh courts or within the jurisdiction of the Constitutional Court. This includes jurisdiction over:

- all criminal cases;
- civil cases involving a citizen who is not an individual entrepreneur as at least one of the parties;
- appeals of administrative and other state actions which do not fall within the jurisdiction of the other courts;
- cases establishing facts having legal significance with respect to citizens (such as recognition of a person as dead or as legally incompetent);
- cases concerning family matters (custody of children, division of property);
- inheritance issues;
- cases concerning rights to housing, pensions and benefits, and other matters of social protection;
- other types of cases.

Most of the cases heard by these courts are not "commercial" in their nature. There are, however, a few types of cases of particular interest to businesses that do remain in their jurisdiction, either because of the status of one of the parties or because they are not specified in the jurisdictional provisions governing the arbitrazh courts. These cases are discussed in more detail in the next chapter.

As indicated above, the structure and organization of the courts of general jurisdiction is subject to some uncertainty at the time of this writing, as legislation defining the system in detail has not yet been passed. The Law "On the Court System of the Russian Federation," which passed in 1996, provides for the Supreme Court of the Russian Federation to be the directly superior court in relation to the supreme courts of the subjects (constituent parts) of the Federation[9] and in relation to military courts.[10] The law also envisions regional courts, which are to consider cases in the first and the second instance, and to exercise other authority as defined by a federal constitutional law. The specific organization, authority, and jurisdiction of military courts and of the supreme courts of the subjects of the Federation is also to be determined by a federal constitutional law, as are the internal organization and specific jurisdiction of the Supreme Court of the Russian Federation. The required federal constitutional laws, however, have not yet been

[9] The constituent parts of the Russian Federation are referred to as a group as the "subjects of the Federation." The different "subjects" are called by differing names, including "republics," "regions," "territories" and others. Which name attaches to a particular subject depends upon a number of factors, including the history of its inclusion into the territory of the Russian Empire or the Soviet Union and the basis for its definition as a separate subject (i.e. homeland of a national or ethnic group, purely geographic and administrative considerations, and so forth). They will be referred to in the Handbook using the current Russian terminology as the "subjects of the Federation."

[10] Because military courts do not play a role in the resolution of the types of disputes with which this Handbook is concerned, they will not be discussed here.

passed. One contentious issue at the time of this writing is the question of the possible role and authority of courts organized by the subjects of the Federation. Current legislation provides that all courts, except possibly the peace courts,[11] are federal courts, but there is strong feeling among many subjects of the Federation that more of a judicial branch is required by the subjects, for the enforcement of local and regional laws and regulations.[12]

Until the new laws are passed, the courts of general jurisdiction will operate in the structure in which they currently exist. This structure includes, at the lowest level, the peace courts, which may hear minor criminal, administrative or civil cases in accordance with the laws establishing them. In many areas, these courts have not yet been established, and the lowest level of the general court system in those areas is the district courts. These district courts hear the majority of civil, criminal and other cases in the first instance, and also consider appeals from decisions of the peace courts. The next level of the system consists of the courts of the subjects of the Federation. These courts hear appeals from the decisions of the district courts. They also hear a limited number of more serious cases in the first instance, and can review cases in supervisory procedure, on the basis of a protest of certain court officials and procurators.

Finally, there is the Supreme Court of the Russian Federation, which has a small first instance jurisdiction over the most serious cases. It also hears cases in cassational review (for errors of law only) and reviews cases in supervisory procedure on the basis of a protest of the Chair or Deputy Chair of the Court or of the Procurator General or his deputies. The Supreme Court also issues guiding explanations concerning the proper application of particular laws, and has the right to submit legislative proposals directly to the parliament.

[11] Peace courts are treated by Article 4 of the 1996 Law on Court Structure as courts of the subjects of the Federation. Their authorities are to be defined by both federal law and the laws of the subjects of the Federation. Their decisions, however, are subject to complete *de novo* review by the federal district courts, the decisions of which can be appealed up the hierarchy in the usual fashion

[12] The subjects of the Federation may organize separate courts to rule on issues concerning their charters or constitutions, and a number of them have done so.

CURRENT STRUCTURE OF THE COURTS OF GENERAL JURISDICTION

Supreme Court of the Russian Federation

Cassational review and supervisory review of cases, very small first instance jurisdiction, issues explanations and guiding instructions, supervision of all lower courts

Courts of the Subjects of the Federation

Review of cases on appeal from district courts in cassation and in supervisory procedure, limited first instance jurisdiction over serious cases

District Courts

Hear the majority of cases in first instance, review *de novo* of decisions of peace courts

Peace Courts

First instance consideration of minor criminal, administrative and civil cases, not yet established in many regions

C. The Constitutional Court of the Russian Federation

1. Jurisdiction of the Court

The Constitutional Court of the Russian Federation currently operates on the basis of a federal constitutional law passed in July of 1994.[13] The Court has jurisdiction over only four types of cases:[14]

1. Cases concerning the constitutionality of federal laws and normative acts issued by the President, Government of the Russian Federation, Federation Council and State Duma; the constitutions and charters of the constituent units ("subjects") of the Russian Federation, and laws and normative acts of those units issued on matters in the joint control of the Federation and its subjects or in an area of jurisdiction belonging to the Federation; treaties and agreements between the

[13] Federal Constitutional Law of the Russian Federation "On the Constitutional Court of the Russian Federation," Sobranie Zakonodatel'stva RF, 1994, No. 13, Item 1447. A full English translation of the law can be found in the journal STATUTES & DECISIONS: THE LAWS OF THE USSR AND ITS SUCCESSOR STATES, Vol. 31, No.4 (July-August 1995) (S.J. Reynolds, ed.).

[14] See Article 3 of the Law "On the Constitutional Court." In addition to jurisdiction over the types of cases discussed in the text, the Court has the right of legislative initiative (i.e. to submit legislation directly) concerning questions within its jurisdiction, and is responsible for issuing a conclusion concerning whether established procedure has been complied with where a charge of state treason or another serious crime is made against the President (relating to the procedure for impeachment). The Court can also be delegated additional powers by the Constitution (presumably through amendment), the Federation Treaty, or federal constitutional laws.

Federation and its constituent parts and among the subjects of the Federation; and international treaties of the Russian Federation that have not entered into force;

2. Cases concerning a dispute about competences between federal bodies, between a federal body and a subject of the Federation, and between the highest bodies of state power of the subjects of the Federation;

3. Cases concerning a request for an interpretation of the Constitution of the Russian Federation; and

4. Cases concerning verification of the constitutionality of a law applied or subject to application in a specific case.

2. Standing to Submit a Complaint

Each of the types of cases, and in some cases sub-types, is governed by particular rules concerning standing and procedures. With respect to the first, second and third types of cases, standing to petition the Court is limited to a specified set of state bodies and officials only.[15] ***The only cases in which private parties have standing to petition the Constitutional Court are those concerning the violation of constitutional rights and freedoms by a law that has been applied or is subject to application in a specific case.*** Standing is limited to those whose rights have been or will be infringed, and the petitioners must submit documentary proof that the law being challenged has been applied or is subject to application with respect to them.[16] Legal entities, including those commonly formed for the purpose of business dealings such as stock companies, limited liability companies and partnerships, are considered to have constitutional rights[17] and to have standing to submit a petition of this type to the Constitutional Court.[18]

3. Relationship to Commercial Dispute Resolution

While the Constitutional Court is clearly not a forum for the general resolution of commercial disputes between parties, it does provide a forum for challenge of laws and other legal acts applicable to commercial matters which a petitioner believes are not

[15] These are defined by Articles 84, 88, 92, 101 and 105 of the Law on the Constitutional Court.
[16] Article 96 of the Law on the Constitutional Court. Such a document is to be issued by the court or other body applying the law at the request of those to whom it has been/will be applied.
[17] See the Decree of the Constitutional Court of the Russian Federation "In the Case Concerning the Verification of the Constitutionality of Points 2 and 3 of the First Part of Article 11 of the Law of the Russian Federation of June 24, 1993 "On Federal Bodies of the Tax Police," Sobranie Zakonodatel'stva RF, 1997, No. 1, Item 197 (the constitutional rights of the person and the citizen apply to legal persons to the extent that the rights, by their nature, may be applicable to them).
[18] See the Decree of the Constitutional Court of the Russian Federation, "Concerning the Case On the Verification of the Constitutionality of the first part of Article 2 of the Federal Law of March 7, 1996 "On the Introduction of Amendments into the Law of the Russian Federation "On Excise [Taxes],"" Sobranie Zakonodatel'stva RF, 1996, No. 45, Item 5202 (limited liability partnerships and limited liability society are associations of citizens within the meaning of the law on the constitutional court and can therefore properly submit a petition concerning the violation of their rights by the retroactive force of tax provisions).

constitutional. In recent years, the Constitutional Court has issued a number of important decisions on issues directly affecting commercial activity, including confiscation of property by customs authorities,[19] liability for late tax payments,[20] retroactivity of tax liabilities, [21] proper procedures for imposition of fines,[22] and other matters. The decisions of the Constitutional Court are binding upon the arbitrazh courts and courts of general jurisdiction, and on all other officials and bodies in the Russian Federation.

D. Arbitration Tribunals

1. History and Development

Arbitration tribunals existed in the pre-Revolutionary period, and for a part of the 19th century were an obligatory form of resolution of disputes among members of partnerships and those concerning stock companies, as well as a means that could be used on the basis of an agreement of the parties. The possibility of use of an arbitration tribunal continued after the revolution only for private disputes and for some disputes on commodities exchanges. State bodies and state enterprises could not use the arbitration tribunals, and they disappeared as an option for domestic disputes with the implementation of a fully planned economic system. The possibility for the use of an arbitration tribunal reappeared at a later period connected to state arbitrazh,[23] but there appears to be little evidence that they were used frequently for economic disputes.

The 1991 Law on Arbitrazh Courts in the Russian Federation contained an article specifically authorizing the transfer of a dispute to an arbitration tribunal or to a mediator for resolution, on the basis of agreement of the parties.[24] The right to transfer a domestic dispute to an arbitration tribunal was preserved by the 1995 Law, although reference to mediation was eliminated.[25] There has been a significant growth in the number of arbitration tribunals, and by 1997 a study done for the arbitrazh courts stated that as many as 250 permanent arbitration tribunals existed in the Russian Federation, with more than 1500 arbitrators included on their lists.[26] Many of these tribunals, however, have narrow fields of specialty or exist for the purpose of dispute resolution in relation to a particular exchange or other institution. Only a few have broad, general jurisdictions.

Two special arbitration tribunals for disputes involving foreign persons or companies were created in the 1930s and continue to operate to the present day. One tribunal was

[19] Decision reported in Sobranie Zakonodatel'stva RF, 1998, No. 12, Item 1458.
[20] Decision reported in Sobranie Zakonodatel'stva RF, 1998, No. 42, Item 5211.
[21] Decision reported in Sobranie Zakonodatel'stva RF, 1996, No. 45, Item 5202.
[22] Decision reported in Sobranie Zakonodatel'stva RF, 1997, No. 1, Item 197.
[23] See, e.g., the Statute on Arbitration Tribunals, confirmed by State Arbitrazh of the USSR, Bulleten' Normativnykh Aktov SSSR [Bulletin of Normative Acts of the USSR], 1967, No. 6.
[24] See Article 7 of the 1991 Law "On the Arbitrazh Court."
[25] For disputes subject to the courts of general jurisdiction, the right to transfer a dispute to an arbitration tribunal for resolution is expressed in Article 27 of the Code of Civil Procedure.
[26] Vestnik Vyshshego Arbitrazhnogo Suda RF [Bulletin of the Higher Arbitrazh Court of the RF], 1997, No. 8, page 93.

established for maritime disputes and related claims (the Maritime Arbitration Commission — still functioning under that name), and the other for disputes arising out of foreign trade activities (the Foreign Trade Arbitration Commission — predecessor to the current International Commercial Arbitration Court under the Chamber of Commerce). The Soviet Union was a participant in the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and the Russian Federation became a participant upon the dissolution of the Soviet Union as its legal successor. In 1993, a general federal law "On International Commercial Arbitration" was passed, applying the requirements of the New York Convention to foreign arbitral decisions and establishing a similar regime for the treatment of decisions of arbitration tribunals in Russia concerning international commercial matters. The law also extended the ability of arbitration tribunals other than the long-established maritime and foreign trade tribunals mentioned above to undertake the resolution of international commercial disputes. It did not, however, equalize the treatment of domestic arbitration tribunals and those concerned with international commercial disputes and significant differences still exist concerning the two, especially with respect to enforcement proceedings.

2. Jurisdiction of Arbitration Tribunals

As a general rule, civil law disputes that are otherwise within the jurisdiction of either the arbitrazh courts or the courts of general jurisdiction may be transferred to an arbitration tribunal. There are several exceptions to this general rule. A dispute may not be submitted to an arbitration tribunal if it is assigned by law to the exclusive competence of a particular state body or a particular court. The substantive legislation concerning the particular type of dispute may prohibit transfer to an arbitration tribunal, as is the case, for example, with the bankruptcy legislation. The transfer of labor disputes and family-law disputes in general to arbitration tribunals is prohibited by the Civil Procedure Code.[27]

The jurisdiction of any arbitration tribunal is dependent upon the will of the parties and can only be established by an agreement between them. ***No type of dispute is generally assigned by law to an arbitration tribunal, and in the absence of an effective arbitration agreement, a dispute will be subject to the jurisdiction of the corresponding court, depending upon the nature of the dispute and the identity of the parties.*** The agreement between the parties to transfer the dispute can be either an arbitration clause in a contract or other agreement to which the dispute relates, or a separate, written agreement to transfer a specific dispute that has arisen.

With respect to international commercial disputes, the 1993 Law "On International Commercial Arbitration" defines the general limits of jurisdiction of arbitration bodies over such cases. That law defines the sphere of international arbitration as including two broad types of cases:

[27] Article 1 of Appendix 3 to the Civil Procedure Code.

1. Cases concerning contractual or other civil-law disputes arising out of foreign trade, where the place of business of one of the parties is located outside the Russian Federation; and

2. Cases in which an enterprise with foreign investments, international organization, or international association operating on the territory of the Russian Federation has a dispute with another such entity or with a domestic entity, and also cases concerning disputes among the founders of such enterprises, organizations or associations.

Many commercial disputes with which this Handbook is concerned will fall into one of these two categories, and the rules and procedures for international commercial arbitration are thus those that will be of most interest and concern. There remain, however, a number of points of confusion due to the existence of separate legislation concerning "domestic" and international arbitration, which are discussed in greater detail in Chapters 2 and 4.

E. The Procuracy

In addition to the courts and arbitration tribunals which may be involved in the direct resolution of disputes related to business activities, there are a number of other state bodies that may play an important role. One of these is the Procuracy — the general prosecutor's office. This body has broad powers and may become involved in the activities of businesses and in their disputes not only through its role as prosecutor in criminal cases and in actions to enforce civil fines and penalties, but also through its powers of "supervision" over observance of the laws and its capacity to intervene in court cases and to reopen a decision by "protesting" (appealing) it to a higher court.

1. What is the Procuracy?

The procuracy existed in various forms for several centuries before the revolution, serving at some times primarily as the public prosecutor for criminal cases, and at others as a supervisory institution designed to ensure that the various bodies and officials of the state observed the laws. Abolished along with the courts immediately following the revolution, it was recreated in 1922. It was an institution independent from other government bodies, with strict internal vertical subordination. Although its specific powers and duties shifted somewhat, the basic functions of the procuracy remained unchanged throughout most of the Soviet period, and consisted of the supervision of legality of actions of state bodies below the highest level and of the behavior of enterprises, institutions and citizens, and also supervision of legality in the conduct of trials and cases by courts and of the observance of legal rules in prisons. In addition to these extremely broad supervisory powers, the procurator also served the function of the "state accuser" or prosecutor in criminal cases for much of the Soviet period.

The primary tool of the procuracy in fulfilling its tasks was the bringing of "protests" — complaints or statements concerning a violation of the requirements of law — to a person, state body or enterprise, or to their superiors. The person or body to whom the protest was addressed was generally required to make some answer regarding measures taken to alleviate the problem or to explain their disagreement with the procurator's conclusion. If satisfaction was not received at one level, the procurator had the right to continue to protest up the chain of superior bodies all the way to the level of the highest state bodies of the USSR.

The procuracy's powers with respect to economic activity were broad. Through its powers of "general supervision," the procuracy had the authority to review activities and records of enterprises, to require oral and written explanations concerning possible violations, and to issue recommendations on the elimination of violations, or in some cases mandatory instructions.[28] If grounds for criminal, administrative or disciplinary proceedings existed, the procurator could issue a decree requiring their initiation, and in more recent years could also file a claim in state arbitrazh.

The procuracy's powers were not limited to major violations of the law and the procurators could and did exercise their powers of recommendation and protest to address such matters as labor discipline, managerial incompetence or errors, and waste or lack of efficiency. The law did not limit the procuracy's powers to state bodies, and specifically included citizens (individuals) in the procuracy's powers of supervision. Thus, as non-state forms of enterprise began to expand, the right to review all business records, demand information from entities and individuals, and to take action concerning any problems found extended to new private businesses and individual entrepreneurs as well as to state entities.

In addition to its "general supervision" powers over economic actors, the procuracy also had a significant role in economic disputes resolved through the courts or state arbitrazh. Through its powers of supervision over legality in the courts, the procuracy had the right and responsibility to supervise the behavior of judges and state arbiters and their proper conduct of cases. If problems or errors were detected, the procurator could notify the superiors of the judge or state arbiter involved. In addition, the procuracy conducted reviews of case decisions and frequently filed "protests" requesting the reconsideration of decisions believed wrongly decided. It was not required that the procurator have been a party to the case for a protest concerning the decision to be filed, nor that a particular public or social interest be at stake, but only that the procurator consider the decision incorrect as a matter of law.

[28] The authority to issue mandatory instructions concerned violations that were likely to cause immediate harm, and therefore could not wait for a protest to be considered and acted upon. This authority was given to the procuracy at a relatively late stage, by amendments enacted in 1987.

2. Current "Supervision" Powers of the Procuracy

In 1992, a new law on the Procuracy was passed,[29] which was extensively revised in 1995[30] after the passage of the 1993 Constitution. The nature and stated goals of the several types of procuracy supervision have been changed and the powers of "general supervision" substantially reduced. Nonetheless, the Procuracy remains an important and powerful part of the legal system and may play a number of possible roles in relation to commercial activities and commercial disputes.

Under the current version of the law, the procuracy's power of supervision over the execution of the laws (previously referred to as "general supervision") has been reduced to apply only to state bodies.[31] General supervision over the execution of the laws by commercial entities and individuals is no longer within the procurator's sphere of authority. With respect to state bodies, the procurator has the right to submit protests concerning acts or actions which violate the law. A protest must be considered within a 10 day period from the day of its receipt, and the results of the consideration immediately sent to the procurator in written form. The procurator also has the power to submit a "representation" concerning the elimination of violations of the law or of the conditions or reasons giving rise to them. A representation is subject to immediate consideration by the body or official receiving it and concrete measures must be taken within a month to eliminate the problem and its causes, about which the procurator must be informed in writing.

In addition to protests and representations, the procurator has the authority to issue a decree concerning violations of the law by individual officials and the need to impose administrative or criminal liability on them. The decree is submitted to the body which has the power to impose such liability and the procurator is informed of the results of the consideration of the decree in writing. The procurator does not have the right to exercise these powers with respect to the Government of the Russian Federation, but the Procurator General is obligated to inform the President of the Russian Federation concerning instances in which the acts of the Government are not in accord with the Constitution or laws of the Russian Federation.

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[29] Law of the Russian Federation "On the Procuracy of the Russian Federation," Vedomosti Verkhovnogo Soveta RF, 1992, No. 8, Item 366.

[30] Sobranie Zakonodatel'stva RF, 1995, No. 47, Item 4472. Some additional changes in the Law on the Procuracy were made very recently, most of which concerned the terms and conditions of service in the procuracy. See the Law of the Russian Federation "On the Introduction of Changes and Additions into the Federal Law "On the Procuracy of the Russian Federation," Sobranie Zakonodatel'stva RF, 1999, No. 7, Item 878.

[31] Supervision powers now apply only to federal ministries and departments, the representative and executive bodies of the subjects of the Federation, bodies of local self government, military administration bodies and bodies of state control (i.e. administrative bodies and those serving inspection and similar functions), and their officials.

A second type of supervision now exercised by the procuracy is supervision over the observance of the rights and freedoms of the person and the citizen.[32] This supervision extends to all of the state and local bodies to which general supervision applies, and also to the administrative bodies of commercial and non-commercial organizations. The rights and freedoms which are to be protected are primarily those included in the Constitution, such as the right to freely dispose of one's talents and labor capacity, freedom of movement, freedom of assembly and other rights. With respect to these issues, the procurator is to consider complaints and petitions, and may initiate a criminal case if a violation of rights involves criminally punishable actions. The procurator may also forward materials for the initiation of an administrative case, and may file suit in a court of general jurisdiction or in an arbitrazh court to protect the rights of those who cannot themselves file suit or of large groups of persons. The procurator also has the protest and representation powers described above. The law currently in effect specifically provides that the procurator is not to substitute for other state bodies nor to interfere in the economic activities of organizations.[33]

3. Current Authority of the Procuracy Respecting Court Cases

In addition to its supervision functions, the Procuracy retains a significant role in court consideration of particular cases. ***The procurator has the right to make petitions or bring suit in a wide variety of cases, where this is specifically envisioned by the relevant legislation and is necessary to protect the rights of citizens or the interests of the state or society.***[34] The procurator can intervene as an additional party in already existing cases for the same purposes. The specific rights of the procurator in each instance are defined by the general procedural legislation related to the court in which the actions occur, and may also be defined by the substantive legislation governing the case involved. In cases being heard in the courts of general jurisdiction, the procurator may submit a conclusion or representation concerning the case to the court, without otherwise participating in the case as a party or third party. The procedural legislation governing the arbitrazh courts does not permit the procurator to submit conclusions, but the procurator may still file cases where this is permitted by the substantive legislation and may enter existing cases as a third party for the purpose of protecting the interests listed above.

In addition to its rights to initiate or participate in court cases, the procurator continues to have significant authority with respect to appeals of court decisions. ***A procurator or deputy procurator may bring a cassational protest (concerning violations of substantive or procedural law) concerning any decision, sentence, determination or***

[32] Articles 26-28 of the Law on the Procuracy.
[33] Article 26, part 2. The Procuracy also retains, under the current legislation, its supervisory powers over bodies conducting search and investigation activities related to criminal cases and over prisons, camps and other places where people are kept under guard or serve sentence. (Chapters 3 and 4 of the Law on the Procuracy.) Since this power has little relationship to commercial disputes it will not be discussed further here.
[34] Article 35 of the law on the Procuracy.

decree of a court that he or she considers to be illegal or without sufficient basis.[35] Such a protest has the same effect as the filing of a cassational appeal by a party, and generally leads to the reconsideration of the case by the cassational court. It is not necessary that the procuracy have taken any part in the case in the lower court and the procurator may file such a protest independent of the wishes of the parties in the case. Procurators may also demand from the court the case materials of any case in which the decision has entered into legal force, or the files on an entire category of cases, for review. If the decisions are believed to be illegal or without sufficient basis, the procurator may bring a protest requesting their review in supervisory proceedings.[36] These powers give the procuracy a potentially significant role in almost any court case, including those concerning commercial matters.

F. Executive Enforcement Bodies

In addition to the procuracy's broad powers, there are a number of executive bodies which are empowered to directly enforce the law in a particular sphere. Examples of such bodies include the tax service, the customs authorities, and the Ministry for Antimonopoly Policy. The structure and general powers of bodies of this type are defined by the statute on the relevant body. Additional detail on the powers and authority of the relevant body are provided by the substantive legislation which the body enforces, which defines the range of penalties, types of orders issuable, amounts of fines, and the subjects against which they may be issued for each individual type of violation that is within the jurisdiction of the relevant body. In most cases, additional regulations or instructions are issued by the body itself which define the procedure for its enforcement activities and forms in which it issues official acts and decisions.

The various bodies may become involved in commercial activity and commercial disputes in several ways. Those bodies which enforce statutes on the basis of complaints may serve as a type of alternative dispute resolution forum for complaints under the relevant law. An example of this type of body is the Ministry for Antimonopoly Policy, which enforces the competition law, the advertising law, and some aspects of the consumer protection laws. Upon receipt of a complaint under these laws the Ministry makes an initial determination concerning whether there is basis to open a case investigation. If it finds that there is such basis, the Ministry continues through a process of investigation and consideration that includes a hearing at which all parties may be represented and present their evidence and arguments. A decision is issued on the basis of the investigation and hearing, which may include mandatory orders requiring specific action and also the compensation of damages. Thus, the Ministry may serve to resolve the dispute between the complaining and respondent entities.

Not all executive bodies which enforce particular statutes serve in the capacity of dispute resolution fora or employ the kind of quasi-judicial procedures just described.

[35] Procurators below the level of deputy may bring protests only concerning those cases in which they participated.

[36] See Chapter 4 for an explanation of review in supervisory proceedings in the arbitrazh courts.

Those bodies which do not rely on complaint and whose laws do not involve questions of balancing the interests of several entities or the conduct of complex analysis may have more simplified procedures through which they conduct investigations and notify subjects of the existence of a violation and the imposition of a penalty. Decisions of state bodies, whether imposed through a simplified or a quasi-judicial procedure, may be appealed on the grounds that the relevant body violated or misapplied the substantive or procedural legislation which is applicable to the action taken. Thus, all of the executive bodies empowered to act in relation to commercial conduct may become involved in disputes concerning appeals of their actions.

Finally, it should be noted that **some of the executive bodies concerned have the right to intervene as a third party in court cases which concern matters within their jurisdiction or sphere of expertise, even if the original case is between private parties and was not initiated by the state body.** This may occur, for example, where the substantive laws which are enforced by the relevant body allow both state enforcement action against a violation and private court action by those injured by the violation to recover damages from the violator. While the enforcement authority may not have a direct interest in the recovery of the private plaintiff in such actions, it may have concerns about court recognition of particular behavior as a violation, about evidentiary matters, and so forth. Unlike the procuracy, however, which has a general capacity to intervene in court cases to protect state and public interests, executive enforcement bodies have rights to intervene in court cases only where this is specifically envisioned in the legislation concerning the particular court body.

WHAT INSTITUTIONS MIGHT PLAY A ROLE IN YOUR DISPUTE?

Dispute Resolution Institutions

Arbitrazh Courts - cases that are (1) related to economic activity where (2) the parties are legal entities or individual entrepreneurs, including appeals of specific state actions; other cases if assigned by legislation, even if conditions (1) and (2) are not met (e.g. all bankruptcy cases)

Courts of General Jurisdiction - all matters that may be heard by a court and are not assigned to either the arbitrazh courts or the Constitutional Court

Constitutional Court - questions of constitutionality of statutes, regulations and other acts, as well as treaties and disputes among some state bodies. Strict standing requirements apply

Arbitration Tribunals - binding resolution of disputes submitted to them by agreement of the parties, with jurisdiction limited by each tribunal's charter and rules and by the general legislation on arbitration tribunals

Other Important Bodies to Know About

Procuracy - the public prosecutor, with authority to bring cases or intervene in cases to represent the interests of the public or the state, and to appeal some court judgments and arbitral awards whether or not a procurator participated in the case

Specialized Bodies - executive bodies responsible for the enforcement of the law in a particular area (e.g. tax, customs, competition policy) using specialized procedures; may have powers to issue mandatory orders, impose fines, and/or intervene in cases concerning their areas of responsibility